IN THE SUPREME COURT OF REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No.156 of 1994

BETWEEN: MARGOT HILLEL

Plaintiff

AND: IRIRIKI ISLAND RESORT LIMITED

Defendant

Coram : Mr Justice Oliver A. Saksak
Mrs Klinda Gama – Clerk of Court

Counsel : Mr Robert Sugden and Mr K.C. Fleming QC for the Plaintiff
Mr Mark Hurley for the Defendant

JUDGMENT

Commencement of the Proceedings

This action commenced by Writ of Summons dated and filed on 12th December 1994.

Claims

The Plaintiff's claim is for damages for personal injury caused to the Plaintiff at the defendant's hotel resort by the negligence of the Defendant, its servants or agents and for breach of contract.

Facts

The Plaintiff was injured during a fall on a pack of stairs at the Defendant's hotel resort at or about 3.30 of 6th February 1993. It had rained that afternoon and after the rain had stopped the Plaintiff and her husband

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walked down the stairs in order to catch the ferry into town. The Plaintiff and her husband were on holidays. All travelling and accommodations were pre-arranged.

The Plaintiff fell on the stairs and injured her back. She has suffered from the injury and she comes before this Court to claim damages against the Defendants.

Prior to the fall, the Plaintiff was involved in a motor vehicle accident in or about 1986. She was injured and has received damages in the sum of about AU$8,000.00.

Evidence

The evidence before the Court is both oral and documentary. The Plaintiff relies on oral evidence of her husband, Mr Hillel and Mr Purdy as expert witness apart from her own.
The Defendant called two expert witnesses. One was Dr. Davie and the other was Mr Nystrom. The Defendants did not call anyone from Management of the Hotel to give evidence as to the fall of the Plaintiff, what immediately transpired and the state of the stairs at the time of the fall.

Balance of Proof

The Plaintiff is required to prove her claims on a balance of probabilities.

Issues

(a) Were the Plaintiff and her husband at the time of the fall contractual entrants?
The Plaintiff has discharged the onus of proof on her concerning this issue. Exhibit P6 is clear that Market Reach Pty Ltd were agents of the Defendants but they have also indicated quite clearly that no liability for injury, accident or otherwise could be attributed to them. The defendant themselves as owners of the premises they contracted out must be liable.

(b) Did the Plaintiff fall on the Defendant's stairs as a result of the Defendant's negligence?

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The fall is not and has never been denied. That being so I answer the question in the affirmative for the following reasons:-

(i) It is so obvious that there is no handrailing on either side of all stairs.

The Defendants operate as a Hotel Resort whose customers/clients are expatriates visiting Vanuatu as tourists who come in varied sizes and ages, whose aims I think are enjoyment, peace and tranquility, and safety both for personal and physical wellbeing. Here I infer that the Plaintiff pre-paid for her accommodation through the Defendant's agent. When that was done, a contractual relationship existed between her and the Defendants that, upon her arrival and during her stay at the Defendant's Hotel, the Defendant would ensure her safety by ensuring that the premises were safe for her use and enjoyment so that she could get her money's worth.

(ii) At no stage did the Defendant advise the Plaintiff verbally or by Notice erected at a conspicuous place that the stairs could be slippery when wet. There is in evidence that the noses of the stairs were painted with paint that was non-slip and there was no evidence from the Defendant to rebut that evidence.

(iii) It is also obvious that the stairs were not fitted with non-slip nose cappings.

(iv) It is in evidence by Mr Purdy that the going and rise dimensions of the stairs were incorrect.

I accept that evidence but I do not think that the Defendant can be made liable in negligence for building stairs which did not conform to the Australian standard. They have no obligation to build in accordance with that standard. But what I find the Defendant were negligent for is that they have failed as a reasonable man in the circumstance would to make the stairs safer by erecting handrails, placing non-slip nose cappings and erecting appropriate Notices advising customers/clients of the possibility that the steps could be slippery when wet. Even after this accident occurred in 1993, nothing has been done by the Defendant. A couple of factors contribute to this:-

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One is that Vanuatu being a tropical country with tropical climate we expert rain to fall and secondly, with a lot of rain a lot of trees, plants and shrub grow. The stairs in question have trees surrounding them and dead leaves fall on them which if left unattended would cause slipperiness to the surface of the stairs. Of course I cannot say that at the time of the fall that is what happened because there is no evidence before me but from every day experience I think I can safely infer that this is a high possibility.

Safety, although was not expressed in the contract, had to be an implied term of the contract and I accept the case of *Calin -v- Greater Union Organization Pty Ltd (1991) 173 CLR 33* as authority for so holding.

The Defendant charges persons who come onto their property and as such they are expected by law to take more care for the safety of those whom they charge. I accept the case *of Morowski -v- State Rail Authority (1998) 14 NSWLR 374 at p.378* as authority for that proposition.

It matters not how safe the Defendants think, say or believe their stairs to be, safety here has to be measured or seen from the perspective of the tourist who becomes the user, customer or client of the Defendant. If it is safe, fine, but if it is found to be unsafe what has or can the Defendant do about it. If the Defendant does nothing about the defects in an attempt to make the stairs safer, they have been negligent. So I find the Defendant in this case to be negligent and are therefore liable in damages to the Plaintiff.

Contributory Negligence

Before considering and assessing quantum I wish to consider whether or not the Plaintiff was negligent herself and contributed to her own fall. From the evidence before me I find that the Plaintiff contributed to her own fall for the following reasons:-

(i) She proceeded to manage the Defendant's stairs at her own choice and election. Her own evidence and that of her husband show that on the day she fell it was raining. The rain had just stopped when they left their bungalows. In her evidence there was water, have anticipated that the stairs would be slippery when wet. The time was 3.30pm. There was no need to hurry into town as most shops and even the market would still be open even after dark. She could have allowed the stairs

to dry up a little bit but she did not. She elected to manage the stairs at her own risk and fell. For that she must receive some blame.

(ii) Secondly the Plaintiff proceeded to manage the Defendant's stairs which she knew were without handrails and which she saw and knew were wet without her husband whom she could use for support. In her own evidence she says he was still locking the door when the Plaintiff proceeded down a couple of stairs. Had she foreseen the possibility of falling without the support of a handrail, she should have waited for her husband to accompany her and give her support. She failed to do so.

(iii) The Plaintiff discarded ~~of~~ her shoes shortly after the accident. This at its best is discarding a useful piece of evidence which can only be to her detriment. This is what transpired in cross-examination:-

Q. "Do you still have them?" (the shoes)
A. "No."
Q. "When did you dispose of them?"
A. "Very shortly after the accident."
Q. "Was that shortly after John wrote to the Manager giving notice of a claim?"
A. "Yes."

The Plaintiff is a school-teacher. She is acquainted with legal processes as she had one for the motor vehicle accident. I do not accept the submissions made on her behalf that she did not or could not understand the implications of a legal proceeding. I see her action as a deliberate attempt to conceal evidence and this must be to her detriment.

Co-efficiency of the Defendant's stairs cannot be fully ascertained without the Plaintiff's shoes.

(iv) The Plaintiff has continued to work although from a couple of medical reports it seems she did take 7 weeks off work initially after her return to Melbourne. But it seems that from 1995 until today the Plaintiff has not had any time off work. This is done at her own choice and election. Indeed it seems to me that none of the doctors have recommended her for rest. That to me infers that the Plaintiff is

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healthy. Where she has chosen to work and then experience pain as a result of the work, she must take responsibility for part of the pains complained of.

For these reasons I assess the Plaintiff's contributory negligence at 30%.

Credibility

There are some matters going to credit of the Plaintiff:-

(i) The Plaintiff omitted to disclose her medical accident back in 1986. Matters which would become subject of a legal battle ought to be fully and frankly disclosed. I accept that the reports given to Doctors Dohrmann, Gilligan and Davie were in contrast to that given to Dr Shannon.

(ii) The flight from Melbourne to Port-Vila took about 4 hours. In her evidence the Plaintiff did not experience any back pain or discomfort during the flight. During the proceedings the Court had to adjourn at certain intervals to accommodate the Plaintiff. The longest period the Court was told the Plaintiff could sit for was about 50 minutes.

(iii) The Plaintiff and her husband were not able to tell the Court how much exactly was the sum paid to the Plaintiff in respect to the motor vehicle accident. I see that omission as a deliberate attempt to conceal evidence which in their view might or would affect quantum of the Plaintiff's claims. These portions of the Plaintiff's evidence are therefore not accepted by the Court.

Further Findings

Examining the evidence further I make the following findings:-.

(a) Bowel problems complained of by the Plaintiff pre-existed the fall in 1993.

(b) Some back pains were the result of the motor vehicle accident in 1986.

(c) It is possible the Plaintiff had taken anti-inflammatory drugs prior to the 1993 fall which caused the ulcers complained of initially.

(d) The Plaintiff had a pre-existing degenerative disease at the L5-SI disc. This was aggravated only by the 1993 fall.

(e) Sexual activity is now normal.

(f) The Plaintiff's disability has been assessed at 20-25%.

Quantum

I now consider and assess quantum. The Plaintiff is Australian and resides in Australia. All her costs except perhaps for cost of taxi in Port-Vila were incurred in Australian Dollars and therefore it is appropriate that this be the currency at which the Plaintiff's claims be assessed. For these reasons the principles of assessments must clearly be distinct from those laid down in the Solzer -v- Garae & Anor [1989-94] 2Vol. 528.

1. General Damages

The sum of AU$40,000.00 has been claimed under this head. I allow the sum of 35,000.00 only. The Plaintiff is not seriously disabled as claimed. Her disability is assessed as being in the order of 20-25% . She still works and does most of the things a perfectly normal person does.

2. Special Damages

(i) For past medical expenses the sum of $1,762.10 is allowed in full.

(ii) For past pharmaceutical expenses to date the sum of $2,498.80 has been claimed. No receipts are produced. Therefore I assess that of the sum claimed, only 50% will be awarded to cater for any future expenses. This would be the sum of $1,249.00.

(iii) For past physiotherapy expenses to date the sum of $8,940.00 are claimed. This is extremely high in the absence of full

documentation. I assess the amount at 50% to cater for any future expenses at $4,470.00.

(iv) For past massage and acupuncture expenses to date a sum of $8,940.00 are claimed. Again for the reason stated in (iii) above I award only the sum of $4,470.00.

(v) For cost of hospitalization for endoscopy, I award the sum of $240.00 as claimed.

(vi) For cost of additional equipment, I award the sum of $524.00 as claimed.

(vii) For additional home help, I award the sum of $15,496.00 for past expenses at $52.00 per week for 298 weeks since the accident. No award is made for future expenses based on the report as to the Plaintiff's disability.

(viii) For costs of swimming the sum of $2,980 at $10.00 per week is claimed. Documentation is not complete. I therefore award 50% of the cost in the sum of $1,490.00 to cater for any future costs.

(ix) For additional cost of taxis in Vila the sum of $18.00 is claimed. This is awarded. A further $ 203.49 is claimed for additional room service. In the absence of adequate documentation this sum is disallowed.

The total sum allowed as special damages for both past and future costs are $25,249.50.

3. Future claims

(i) For future hospitalization and operation the sum of $4,000.00 are claimed. No doctors can and have said in certain terms that operation would be necessary or that it is a high possibility. This claim will be disallowed.

(ii) For future medication, physiotherapy, massage and swimming the sum of $72,076.00 are claimed. This claim is baseless but

the Court has allowed for adequate future expenses under 2(ii), (iii), (iv) above.

(iii) For future housekeeper's cost, due to Dr. Galligan's assessment of disability it seems to me there would be no need for an award in respect of future costs. The sum claimed for this head is disallowed.

In summary the Court enters judgment for the Plaintiff against the Defendant in the sum of $60,249.50 as follows:-

(1)	General Damages =	$35,000.00
(2)	Special Damages =	$25,249.00
		$60,249.00

I have decided that the Plaintiff's contributory negligence is assessed at 30%. Therefore 30% of the sum of $60,249.00 are deducted accordingly. The balance due to the Plaintiff is the sum of $42,174.30.

Costs ?

DATED AT PORT-VILA, this 14 day of DECEMBER, 1998

BY THE COURT

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OLIVER A. SAKSAK
Judge

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